



DISCLOSURE: A JAMAICAN PROTOCOL

Office of the Director of Public Prosecutions



***In Commemoration of the 50th Anniversary
of the
Establishment of the Office of the Director of Public Prosecutions
in 1962***



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“[T]he right of a criminal defendant to a fair trial is absolute... The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial.”

Randall v. R. (Cayman Islands), 2002 UKPC 19.

Foreword



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Being an effective Prosecutor is no easy task. Prosecutors in Jamaica must demonstrate fearlessness, impartiality and a monumental work ethic to serve the public interest in maintaining law and order. The duty to make disclosure is one very important aspect of Prosecutors' responsibilities.

On 16th April 2002, the Lords of the Judicial Committee of the Privy Council (JCPC) dealt with the issue of Prosecutorial conduct in *Randall v. R. (Cayman Islands)*, 2002 UKPC 19, and affirmed that, “[T]he right of a criminal defendant to a fair trial is absolute... The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial.”

The Jamaican Office of the Director of Public Prosecutions (“ODPP”) recognizes that trial fairness requires that Prosecutors embrace and practise high standards of ethics at all times. Since my appointment as DPP in March 2008, I have been aware of the public’s clamour for transparency and accountability. I remain committed to enhancing managerial structures and implementing systems that strengthen transparency and accountability.

The public deserves to have best practices (which have always been practised by Prosecutors) codified, available and easily accessible. This Protocol will form a chapter

of a future Prosecutorial procedural manual, which is another step towards providing sought after and promised transparency. It will be a living document, revised as necessary to reflect ever-changing local and international law and practices.

Disclosure is the practice of Prosecutors revealing to the defendant material on which the case against him or her is based. This is a critical element of fairness within a trial. Taking the bold step of codifying best practices, we look forward to the concept of shared disclosure responsibilities between Defence and Prosecutors in the interest of fairness to all parties. The pendulum of justice, after all, should swing in both directions.

This Protocol outlines how Jamaican Prosecutors consistently strive to approach as well as keep pace with ever evolving case law and international best practices. This protocol discusses stages, content, exceptions to and forms of disclosure. Of course, each case requires assessment on its particular merits, relevant law and application of Prosecutorial discretion. The Prosecutor's judgment will always be a delicate balancing act in what is usually a dynamic context with many variables operating.

Fair and effective prosecution necessitates commitment from those required to discharge these duties. We are open to constructive criticism and see it as an opportunity to improve and enhance our service delivery in the public interest. By continuing to employ the criteria contained in this Protocol we will demonstrate our commitment to these principles and seek to discharge our duties accordingly.

I acknowledge appreciation to my staff for their support and hard work on this initiative. I thank Justice Canada for its technical legal assistance in drafting this Protocol, as well as our partners in the Department of Foreign Affairs, Trade and Development Canada for their support. We look forward to continuing the process of codifying Prosecutorial best practices. I truly believe codification will provide an opportunity to enhance efficiencies and allow the public to better understand the functions of Jamaica's Public Prosecution Service and justice system.

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DISCLOSURE

A) PRINCIPLES

1. Disclosure refers to the duty of the Prosecution to provide the accused with copies of, or access to, any material held by the Prosecution which might reasonably be considered capable of undermining the case for the Prosecution against the accused or of assisting the case for the accused, regardless of whether that material will be introduced as evidence.¹
2. Disclosure to an accused is an essential component of the accused's right to a fair trial, a guarantee enshrined in section 16(6)(b) of the Jamaican *Charter of Fundamental Rights and Freedoms* and which includes the right to make full answer and defence.² The Prosecutor's duty to ensure that proper disclosure is made forms part of the professional responsibility to act fairly and impartially, in the interests of justice and in accordance with the law.³ Moreover, a Prosecutor's primary objective is not to seek to convict, but to see that justice is achieved through a fair trial on the merits.⁴ The accused's rights must, though, be balanced with the need to ensure that material is not disclosed which could jeopardise other interests, including those of

¹ This duty stems from the principle of equality of arms and recognition that the State does not have ownership of the materials. The test of whether information ought to be disclosed is a matter of materiality, not admissibility: *R. v. Ward* (1993) 2 All E.R. 577 at 601.

² *Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act*, 2011, at s. 16(6)(b) states: "Every person charged with a criminal offence shall – (a) be informed as soon as reasonably practicable, in a language which he understands, of the nature of the offence charged; (b) have adequate time and facilities for the preparation of his defence..." S. 16(6)(b) mirrors the former s. 20(6) of the *Constitution of Jamaica*. "Adequate time and facilities" under s. 20(6) has been interpreted by the courts to include materials in the possession of the Prosecution that are relevant to the issues in the case: See *Franklyn and Vincent v. R.* (1993) 42 WIR 262 at 271 and *R. v. Bidwell* (26 June 1991) (unreported). This constitutional guarantee is drawn from Article 6(3)(b) of the *European Convention on Human Rights*.

³ The court in *R. v. Barrett* (1970) 16 WIR 267 emphasized that counsel for the Crown acts for the "minister of justice whose prime concern is its fair and impartial administration." See also, *Linton Berry v. R.* (1992) 41 WIR 244; *Randall v R (Cayman Islands)*, [2002] UKPC 19.

⁴ See *The Legal Profession (Canons of Professional Ethics) Rules, Legal Professions Act*, Jamaica Gazette Supplement, Vol. C1, No. 71, December, 1978, Cannon III(h).

victims or witnesses who may be exposed to harm, or of effective law enforcement.⁵

3. Disclosure has many benefits. It can encourage a guilty plea and can assist Crown Counsel in identifying weaknesses in the case. Disclosure can also be an important tool for judicial economy: it encourages efficient use of court time by facilitating the resolution of disputed facts, assisting in the settlement of time-consuming yet non-contentious issues in advance of trial and, occasionally, eliminating the need for a preliminary hearing or resulting in an earlier conclusion of a case. Further, disclosure can assist in the timely preparation and presentation of the accused's case. However, to ensure that these benefits are realised and that it does not become an exercise that overburdens participants in the trial process and diverts attention from the relevant issues leading to unjustifiable delay or waste of resources, excessive disclosure should not be permitted.⁶

4. In the absence of specific Jamaican legislation on disclosure, these guidelines reflect the law as stated in relevant jurisprudence, and embody the standards set out in the Jamaican Guidelines for Disclosure in Criminal Matters, 1996, the *Judicature (Case Management in Criminal Cases) Rules*, 2011, and the Commonwealth Secretariat's Draft Model Disclosure Legislation and Guidelines.

⁵ See *Victim's Charter*, July 19, 2006.

⁶ Excessive disclosure would generally be disclosure of materials beyond the particulars laid out in paragraphs 5-21 in this document.

B) GENERAL MATTERS

The Stages and Content of the Disclosure Obligation

5. The extent of the disclosure obligation may vary depending on the stage at which disclosure is being made. The obligation first arises with preliminary disclosure, to allow the accused to determine whether anything in the statements or other material supplied negates a viable defence and, if not, to prepare his case accordingly or to make any decisions as to plea or mode of trial. Full disclosure then commences and continues throughout the life of the case, and is predicated on the actual existence of the material. The Defence may request additional disclosure at any time during the case where it appears to the Defence that further disclosure ought to be made available. As a result of the continuing obligation to make disclosure, a Prosecutor is required to provide disclosure materials throughout the trial, appeal process and expiry of all appeal periods.
6. The way in which the disclosure process takes place will also be shaped by the complexity of the matter. For simple matters, for instance, full disclosure should be made either prior to a first appearance or shortly thereafter.
7. The court in *Franklyn and Vincent v. R* held that the right to disclosure set out in s. 20 of the *Jamaican Constitution* (now s. 16 of the *Charter*) extends to summary trials.⁷ The court stated that “[w]here a request is made in a case to be tried summarily, if it is not a case involving petty offence, the request should be carefully considered. If there are no circumstances making this course undesirable, for example because of

⁷ *Franklyn and Vincent v. R.* (1993) 42 WIR 262 PC (approving *R. v. Bidwell* (1991) 28 J.L.R. 293). Additionally as per *Franklyn*, if an indictable offence may be tried as such or summarily and is, in fact, tried summarily, then witness statements should be disclosed by the Prosecution.

the need to protect the witness, then the preferable course in the interest of justice is to disclose the statement...”.⁸ The greater the penalty on summary trial, the more onerous the obligation to disclose.⁹

Preliminary Disclosure

8. Preliminary disclosure is intended to inform the accused at an early stage in the proceedings of the nature of the allegations made against him/her, in order to assist the accused in assessing the availability of any defences and in determining whether to plead guilty or not guilty. The material provided may also be used by the accused in a bail application.
9. Obligations are subject to the disclosure exceptions described below.

Full Disclosure

10. Full disclosure means disclosure of information for which Defence Counsel is entitled according to the law. Full disclosure does not mean unqualified right to disclosure of all possible information. For example, disclosure is subject to exceptions as outlined in this chapter and Crown discretion.
11. As soon as practicable after preliminary disclosure is made, the Prosecutor must disclose to the accused all relevant information, including material to be produced at trial and material that could reasonably be used by the Defence even if the Prosecution does not intend to rely on it at trial.¹⁰ Every effort should be made for full

⁸ In summary trials, if a request is made by the Defence, then the Prosecution must provide statements of prosecution witnesses unless the case is in respect of a petty offence or where the Prosecution believes that it is necessary to withhold the statement for the protection of a witness.

⁹ *Franklyn and Vincent v. R.* (1993) 42 WIR 262 PC.

¹⁰ See the Commonwealth Secretariat Draft Model Disclosure Guidelines and the Canadian Federal Prosecution Service Deskbook at Ch. 18.

disclosure to take place before the first plea and case management hearing date, subject to availability of the material and directions of the learned trial judge.

12. The information that ought to be disclosed will otherwise vary on a case-by-case basis. Prosecutors should bear in mind that while items of material viewed in isolation may not be reasonably considered important for disclosure purposes several items together can have that effect. However, Prosecutors will only be expected to anticipate what material might weaken their case or strengthen the defence in the light of information available at the time of the disclosure decision, and this may include information revealed during questioning of witnesses and the accused.

13. If the Prosecutor responsible for a case is in doubt about whether information should be disclosed, s/he should consult a senior Prosecutor.¹¹ Ultimately, any doubt should be resolved in favour of disclosure unless the information is exempted.¹² A determination of whether the Prosecution has provided adequate disclosure in preliminary inquiry matters should not fall to the court hearing the matter.¹³

14. That being so, Prosecutors must not abrogate their duties by making wholesale disclosure to avoid carrying out the disclosure exercise themselves. Likewise, Prosecutors should not support speculative or indiscriminate requests for disclosure.

¹¹ Guideline 13 (Practice Direction) states that “[w]here doubt arises as to the application of the guidelines the Office of the Director of Public Prosecutions may be consulted.”

¹² Commonwealth Secretariat Draft Model Disclosure Guidelines.

¹³ *DPP v. Chief Magistrate (No 2)* (2003) 67 WIR 240.

15. The above obligations are subject to the disclosure exceptions described below.

Additional Disclosure at the Request of the Defence

16. As soon as practicable after the accused provides a written statement requesting further disclosure, the Prosecutor must, in the light of that request:

- determine whether a disclosure obligation applies to any information held by the Prosecutor (see full disclosure, above); and
- comply with that obligation or, if no such information exists, provide to the accused a written statement indicating that there is no further material to provide.¹⁴

17. These obligations are subject to the disclosure exceptions described below.

Continuing Duty of Disclosure by the Prosecution

18. Even after full disclosure has been made, the Prosecutor's disclosure obligation continues until the conclusion of the criminal proceedings against the accused.¹⁵ The Prosecutor must at all times consider whether material exists that falls under the disclosure obligation but which has not been disclosed.¹⁶ If such material is identified, then the Prosecutor must disclose it to the accused as soon as is reasonably

¹⁴ Commonwealth Secretariat Draft Model Disclosure Legislation.

¹⁵ *R. v. Maguire and others* (1992) 94 C.A.R. 133. See, for example, *R. v. Cecil Nugent* (1992) 29 J.L.R. 317 where the Prosecution and Defence realised between the conviction and sentence that the description of the accused made by the complainant to police differed substantially from the convicted person's actual appearance.

¹⁶ See, for example, *R. v. Lindel Grant and Leslie Hewitt* (1971) 12 J.L.R. 585.

practicable.¹⁷ Similarly, as indicated in Guideline 7 (Practice Direction), the continuing duty of disclosure arises where there is a material change to the information already disclosed pursuant to the general obligation.¹⁸

19. These obligations are subject to the disclosure exceptions described below.

Disclosure Exceptions

20. The Crown's duty to disclose is not absolute. Disclosure obligations do not apply in relation to:

- Privileged information
 - litigation privilege/work product privilege¹⁹
 - information protected by solicitor-client privilege²⁰
 - Cabinet documents²¹
 - confidential communications and records regarding medical assessment and treatment²²
 - therapeutic and counselling records, including sexual assault counselling records, when certain offences are being tried
 - certain priest-parishioner communications²³

¹⁷ *Ibid.*

¹⁸ ODPP Guideline 7 (Practice Direction); See also Commonwealth Secretariat Draft Model Disclosure Legislation.

¹⁹ In Canada, Crown "work product" includes internal Crown Counsel notes, legal opinions provided to police and correspondence: *R. v. Regan*, [1997] N.S.J. No. 428 (N.S.S.C.); *R. v. Shirose*, [1999] S.C.J. No. 16, [1999] 1 S.C.R. 565 (S.C.C.). The Prosecution and police are treated as a single entity for the purposes of disclosure: *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66.

²⁰ Guideline 3(c) (Practice Direction); *R. v. Derby*, Magistrates Court ex p. B (1995) 3 W.L.R., 681. For the law in Canada, see: *R. v. Shirose* (1999), 133 C.C.C. (3d) 257 (S.C.C.).

²¹ This includes information that may be considered a confidence of the Queen's Privy Council such as Cabinet documents, communications between Ministers of the Crown and other documents. See also, Section 15 of the *Access to Information Act*, 2004.

²² In Canada, where a lawyer enters into confidential or non-confidential communication with a third party, such as a medical expert, those communications are subject to litigation privilege where the litigation is the dominant purpose of the communication.

- communications between husband and wife
- Information not under Crown control
 - material held by third parties²⁴
- Irrelevant information
 - material that is not relevant to the case or that is neutral in character²⁵
 - information which goes only to the credibility/reliability of defence witnesses (including previous inconsistent statements and previous convictions of defence witnesses)²⁶
- Information the disclosure of which is otherwise protected by law
 - confidential government information
 - communication regarding children, including social services records, when certain offences are being tried

²³ Commonwealth Secretariat Draft Model Disclosure Guidelines. In Canada, communications with religious advisors are not automatically privileged. Per *R. v. Gruenke*, [1991] 3 SCR 263, aff'd *Glegg v. Smith & Nephew Inc.*, 2005 SCC 31 at para. 24 such communications will only be subject to privilege if they meet the following analysis: "(1) the communications must originate in a confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation."

²⁴ The law in Canada is set out in *R. v. O'Connor* (1995), 103 C.C.C.(3d) 1 (S.C.C.) and *R. v. Mills* (1999), 139 C.C.C. (3d) 321 (S.C.C.).

²⁵ ODPP Guideline 3 (Practice Direction). In Canada, this exclusion was set out in *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.). In Canada, relevance in this context is determined with reference to whether there is a reasonable possibility that the information could assist the Defence.

²⁶ *R. v. Winston Brown* [1995] 1 Cr. App. R. 191.

- Information which falls under public interest immunity, where a non-disclosure order has been made²⁷
 - information the disclosure of which would be likely to cause serious prejudice to the public interest
 - information the disclosure of which would be injurious to international relations, national defence or national security²⁸
 - information that, if known, might facilitate the commission of an offence²⁹
 - information the disclosure of which would be likely to prevent or obstruct the prevention, detection, investigation or prosecution of crime
 - covert and/or innovative investigation methods³⁰
 - forensic methods and systems of analysis for the purpose of investigation³¹
 - information that may prejudice or alert a person to an ongoing police investigation³²

²⁷ See *Franklyn and Vincent v. R.* (1993) 42 WIR 262; Kathy Anne Pyke, Assistant Director of Public Prosecutions, “Disclosure: The Duties and Obligations of Prosecuting Counsel in Criminal Proceedings”, Presented at Prosecutor’s Seminar in Trelawny on 7 December 2003 at 38.

²⁸ Kathy Anne Pyke, Assistant Director of Public Prosecutions, “Disclosure: The Duties and Obligations of Prosecuting Counsel in Criminal Proceedings”, Presented at Prosecutor’s Seminar in Trelawny on 7 December 2003 at 38 (“Jamaican law has always recognized the interest of the public to prevent the disclosure of relevant evidence to the defendant, in matters of national security when claimed by the Prosecution and must be considered by the Court. In making a determination, the Court must balance the desirability of preventing disclosure in the public interest against the interest of justice: *R. v. Governor of Pentonville Prison ex p Osman* (#1) (1992), All E.R. 108”). See also Section 14 of the *Access to Information Act*, 2004; *Edward and Lewis v. The United Kingdom* (Applications nos. 39647/98 and 40461/98), [2004] ECHR 39647/98; *Canada Evidence Act* (R.S.C., 1985, c. C-5) at ss. 37 and 38.

²⁹ ODPP Guideline 3(d) (Practice Direction).

³⁰ ODPP Guideline 3(e) (Practice Direction). In Canada, information that may reveal confidential investigative techniques used by the police is generally protected from disclosure: See *R. v. Durette* (1994), 88 C.C.C. (3d) 1 (S.C.C.), at 54.

³¹ See Section 16 of the *Access to Information Act*, 2004.

³² ODPP Guideline 3(d) (Practice Direction). In Canada, the Crown may delay disclosure for this purpose but cannot refuse it, i.e., withhold disclosure for an indefinite period. See *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.) at 9, and 12.

- information that relates to the internal workings of the Police Force³³
- information the disclosure of which would be likely to cause serious injury or death to any person
 - information that may compromise the safety of an individual within the Witness Protection Program
 - material containing sensitive or delicate details relating to the maker³⁴
- other information that must be protected in order to ensure that persons who have supplied information to police are not harassed;³⁵
 - identity of informants³⁶
- See Part III of the *Access to Information Act*, 2004 for official documents exempted from disclosure.

21. On application by the Prosecutor or the accused, or of its own motion, the court may vary or revoke a non-disclosure order if it considers it in the public interest to do so.³⁷

³³ ODPP Guideline 3(h) (Practice Direction).

³⁴ ODPP Guideline 3(g) (Practice Direction).

³⁵ ODPP Guideline 3(b) (Practice Direction).

³⁶ ODPP Guideline 3(a) (Practice Direction). For the law in Canada, see: *R. v. Scott* (1990), 61 C.C.C. (3d) 300 (S.C.C.); *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 at 14 (S.C.C.); *R. v. Leipert* (1997), 112 C.C.C. (3d) 385 at 392-393 (S.C.C.), *aff'd R. v. Named Person B*, 2013 SCC 9 at para. 43. The privilege protects the informant's name as well as information which may tend to reveal the identity of the informant. Questions therefore cannot be asked of witnesses which would narrow the possible field of informants to an identifiable point. However, in Canada, an exception to informant privilege (referred to in Canada as informer privilege) is made where an accused's innocence is at stake, such as where: the informant is a material witness to the crime; the informant has played an instrumental role in the offence; or the accused seeks disclosure of materials filed in support of a search warrant or wiretap application in order to argue that a search contrary to the Canadian *Charter* took place. It is important to note that, in Canada, the informant privilege does not apply where the individual is considered an agent of State police rather than an informant. The test to determine this issue is whether the exchange between the accused and the informant would have taken place in the form and manner in which it did but for the intervention of the State or its agents: *R. v. Broyles* (1991), 68 C.C.C. (3d) 308 at 318-319 (SCC). See also Confidential Informants, below.

General Procedure in Respect of Non-Disclosure

22. Where there is a delay or a complete refusal to disclose materials based on the above exemptions, it is incumbent upon the Prosecution to communicate to the Defence and to the court the fact of and reason for the delay or refusal.³⁸ However, where such communication would jeopardize the information or the informant (as in the case of the public interest immunity exception), the Prosecutor(s) should consult senior Counsel in the ODPP in order to determine the best course of action. Any disputes as to whether material should be withheld will ultimately be resolved by the court.³⁹

Confidential Informants

23. Information which might disclose the identity of a confidential informant or the existence of a continuing investigation should be withheld.⁴⁰ In recognition of the harm which may result, in particular from the inadvertent disclosure of an informant's identity, Prosecutors involved in the process of disclosure should be alive to the possibility of such inadvertent disclosure and seek, when appropriate, from the relevant law enforcement agency, an indication of whether any damaging information is contained in the material provided to the Crown for disclosure.

24. In this regard, it is important to keep in mind that facts which may appear innocuous may actually reveal a person's identity. The Prosecution should seek arrangements with law enforcement agencies by which the agencies will undertake to identify cases involving information which

³⁷ *Judicature (Case Management in Criminal Cases) Rules*, 2011 at ss. 5(2) and 5(3).

³⁸ ODPP Guideline 4 (Practice Direction).

³⁹ ODPP Guideline 5 (Practice Direction).

⁴⁰ ODPP Guideline 3(a) (Practice Direction).

should not be disclosed or for which disclosure will require editing or other action to protect the public interest involved.⁴¹

Form of Disclosure

Timing of Disclosure

25. To ensure that the disclosure process provides the greatest protection for the rights of the accused, a Prosecutor should make timely disclosure to Defence Counsel or directly to an unrepresented accused.⁴² Early disclosure has a beneficial impact on the whole process and is, in many instances, essential to an early resolution of the case. Providing timely disclosure can assist in preventing extreme delays that lead to trial adjournment. Moreover, making disclosure at an early point in the litigation process may result in admissions which will reduce the length of, and in some cases even the need for, a judicial hearing. For these reasons, full disclosure should be provided as soon as it is reasonably possible. As gathering all materials to be disclosed is typically a lengthy process, disclosure should be provided as soon as it becomes available, rather than waiting to disclose all materials together.

Delayed Disclosure

26. The Prosecution has discretion as to the precise timing of the disclosure and to determine whether there is a legally valid basis upon which information may be delayed or withheld.⁴³ Further, timing may relate to

⁴¹ The leading case on confidential informants in Canada is *R. v. Leipert* (1997), 112 C.C.C. (3d) 385. Also see the Canadian Federal Prosecution Service Deskbook at Ch. 36.

⁴² Section 9(2)(c) of the *Judicature (Case Management in Criminal Cases) Rules*, 2011 states that in preparing for any hearing at which evidence will be introduced, each party must “make appropriate arrangements to present any written or other material.”

⁴³ The law in Canada concerning the Prosecutor’s discretion as to timing is set out in *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.). Note that Commonwealth courts have generally not produced definitive rulings on the precise timing of Prosecution pre-committal disclosure.

parts of the disclosure: while there may be a valid reason to delay disclosure of a portion of certain material, it may be necessary to disclose the remainder at an earlier point in time.

Manner of disclosure

27. The Prosecutor must make disclosure of information by any reasonable means having regard, amongst other considerations, to the following:⁴⁴

- the form of the information (documentary, electronic, photographic, etc.);
- the volume of the information to be disclosed;
- the sensitive nature of the information being disclosed;
- the accused being unrepresented and/or in custody;
- the resource implications for both the Prosecutor and the accused;
- the location of the accused;
- any time restrictions on the making of disclosure;
- the provisions which may be made for access to or inspection of the information; and
- the involvement of a third party in the disclosure process.

28. If the Prosecution is of the view that the disclosure of certain material would risk damage to an important public interest, Prosecutors should disclose as much of the material as is otherwise possible, for instance through providing to the Defence redacted, edited or summarized copies of the materials.⁴⁵ This will enable the Prosecution to remove or obscure non-disclosable information before disclosing the portion that is subject to the obligation.

⁴⁴ Commonwealth Secretariat Draft Model Disclosure Legislation; Commonwealth Secretariat Draft Model Disclosure Guidelines.

⁴⁵ UK Attorney General's Guidelines on Disclosure. ODPP Guideline 7 speaks to the need to guard against the disclosure of confidential or sensitive information contained in a witness statement by redacting or editing the statement.

Disclosure of Prohibited Materials

29. Where the material to be disclosed is not only evidence, but also constitutes the offence itself or a separate offence such that its disclosure would result in circulation of materials which are themselves the subject of a criminal prohibition, the accused's right to information necessary for the preparation of his/her defence must be weighed against the public interest in preventing the dissemination or other improper use of this material (as well as the privacy rights of any person depicted).⁴⁶ Such materials include but are not limited to pornographic images, obscene photographs or video recordings of sexual assault.⁴⁷ Where disclosure is necessary, the Crown must approve conditions under which Defence Counsel or an unrepresented accused will be given an opportunity to privately view the material.⁴⁸

Record Keeping

30. Prosecutors must ensure that they record in writing all actions and decisions they make in discharging their disclosure responsibilities.⁴⁹

Efficiency in Disclosure

31. All materials should be disclosed to the accused without charge.⁵⁰ However, Prosecutors should seek to effect disclosure through the most

⁴⁶ However, as a general rule in Canada, an accused is given a copy of disclosure materials unconditionally and any departure from that norm must be justified by the Crown: See *R. v. Mercer* (1992), 105 Nfld. & P.E.I.R 1 (Nfld. S.C.).

⁴⁷ See the Jamaican *Child Pornography (Prevention) Act*, 2009.

⁴⁸ In Canada, other technological solutions are sometimes made available, such as providing disclosure on a sealed computer where the images can not be transmitted or acquired in any way, or by way of a software program that accomplishes the same as well as automatically preventing access to the material after a prescribed period of time.

⁴⁹ Commonwealth Secretariat Draft Model Disclosure Guidelines.

cost-effective means, for instance through the use of available electronic communication rather than providing boxes of hard copy documents.⁵¹ Prosecutors should work together with law enforcement agencies in this effort, as police and Prosecution's use of proper file management techniques is integral to making efficient and cost effective disclosure.

Failure to Fulfil the Disclosure Obligation

32.A Prosecutor must not knowingly attempt to deceive a tribunal or influence the course of justice by suppressing what ought to be

⁵⁰ This is the current practice in Jamaica. For the Canadian context, see the Martin Committee Report, note 6, at 272; *R. v. Blencowe*, supra, at 537. The following are suggested parameters for future consideration:

The following "basic disclosure" materials should be provided to the accused without charge:

- (a) copies of documents, photographs, etc. that Crown Counsel intends to introduce as exhibits in the Crown's case;
- (b) the Prosecutor's file, if one has been prepared; and
- (c) where no Prosecutor's file has been prepared, copies of witness statements, a synopsis, the information, and any reports prepared by the police or investigators.

Each accused is entitled to one copy of the above "basic disclosure" materials. Where an accused person requests an additional copy or copies, the accused may be charged a reasonable fee for this service.

Responsibility for the costs of preparing materials that do not fit into the category of "basic disclosure" should be determined on a case-by-case basis, for example, photographs that will not be introduced as exhibits by Crown Counsel. In Canada, where a person is in receipt of support from Legal Aid, disclosure costs not covered by the Prosecution are generally covered by Legal Aid.

In instances of unfocused or unreasonable requests involving substantial numbers of documents, it may be appropriate to shift the resource burden to the Defence, by requiring that the costs be borne by the accused. Failing agreement, simple access without copies may be provided.

⁵¹ Note, though, that electronic disclosure will not always be a more cost effective approach than providing hard copies of materials. For electronic disclosure, technology is required for Prosecutors to read the materials and for police to scan and index materials. Compatible technology must also be available to the Defence and in prison facilities so that those in custody will be able to access the materials when appropriate. Further, the electronic system must be easily searchable and must have a redaction function. Police must also guard against scanning all materials into the system indiscriminately.

disclosed.⁵² Likewise, the Prosecution must protect against inadvertently making dishonest or fraudulent disclosure as a result of the omissions of an investigator, witness, police officer or other party involved in the case.

33. If a Prosecutor unknowingly omits to disclose any materials that s/he would be required to produce, s/he should make disclosure at the earliest available opportunity and do all that can reasonably be done in the circumstances to rectify the omission.

34. The court has the discretion to give directions regarding disclosure on its own initiative or on application by a party and may specify consequences of failing to comply with a direction.⁵³ Should a party fail to comply with a direction, the court may:

- fix, postpone, bring forward, extend, cancel or adjourn a hearing; and
- impose such other sanction as may be appropriate.⁵⁴

35. A case progression officer nominated by the parties at the beginning of each case will monitor compliance with directions regarding disclosure.⁵⁵

36. A failure to disclose may also result in grounds for appeal on the basis of abuse of process or an irregularity in the trial, though it will depend on

⁵² Canon III(h) of *The Legal Profession (Canons of Professional Ethics) Rules, Legal Professions Act*, Jamaica Gazette Supplement, Vol. C1, No. 71, December, 1978 states that “[a]n Attorney engaged in conducting the Prosecution of an accused person has a primary duty to see that justice is done and he shall not withhold facts or secrete witnesses which tend to establish the guilt or innocence of the accused.” Nor may the Prosecution withhold material helpful to its case in order to surprise the defendant on cross-examination: *R. v. Phillipson* (1990) 91 Cr. App. R. 226 and *R. v. Sansom* (1991) 92 Cr. App. R. 115. In Canada, similar guidance is given in the LSUC Rules of Professional Conduct, Rule 4.01(2)(e).

⁵³ *Judicature (Case Management in Criminal Cases) Rules*, 2011 ss. 5(2)(b) & 5(2)(i). See also Commonwealth Secretariat Draft Model Disclosure Legislation.

⁵⁴ *Ibid.* at s. 5(4). Note that, per s. 6, a party may also apply to vary a direction.

⁵⁵ *Ibid.* at s. 4(4)(a).

the materiality of the information and will not automatically result in a conviction being quashed.⁵⁶

Prosecution's Obligation to Preserve Information

37. Once information is obtained by the Prosecution which it would reasonably expect to be subject to the disclosure obligation, it is required to preserve the information so that it may be disclosed.

Confidentiality

Prosecution's Duty of Confidentiality

38. All government employees have a duty to refrain from disclosing confidential information.⁵⁷ Although disclosure is a duty imposed by law, confidentiality constraints require that the Prosecution not disclose more information than is necessary.⁵⁸ Further, Prosecutors must exercise due diligence in supervising non-lawyer staff to ensure that they comply with this duty.

Accused's Duty of Confidentiality

39. Where the Prosecutor discloses information to an accused pursuant to his/her disclosure obligation and that information is protected by law, the accused must not use or disclose the information or anything recorded in it other than:

⁵⁶ Kathy Anne Pyke, Assistant Director of Public Prosecutions, "Disclosure: The Duties and Obligations of Prosecuting Counsel in Criminal Proceedings", Presented at Prosecutor's Seminar in Trelawny on 7 December 2003 at 39-40.

⁵⁷ This is consistent with the *Official Secrets Act*. Note that the Ministry of Justice has indicated that it is considering a repeal of this *Act* and that such action was given support in 2011 by a Parliamentary Joint Select Committee appointed to review the *Access to Information Act*.

⁵⁸ Canon IV(t)(i) of *The Legal Profession (Canons of Professional Ethics) Rules, Legal Professions Act*, Jamaica Gazette Supplement, Vol. C1, No. 71, December, 1978 states that "[A]n Attorney shall not knowingly...reveal a confidence or secret of his client." See the LSUC Rules of Professional Conduct, Rule 2.03.

- for the purposes of the proper preparation and presentation of the accused's case in the proceedings in relation to which the information was disclosed (the original proceedings);
- with a view to the taking of an appeal in relation to the matter giving rise to the original proceedings; or
- for the purposes of the proper preparation and presentation of the accused's case in any such appeal.⁵⁹

40. The Prosecution may seek an undertaking from the Defence that any released materials will not be disclosed to parties other than the accused and his/her counsel.⁶⁰

C) SPECIFIC MATTERS

Material Held by Third Parties

Accused Application for Disclosure from Third Parties

41. At any time after full disclosure by the Prosecution, an accused in criminal proceedings may, with notice to the Prosecution and the third party, apply to the court for an order that information that s/he reasonably believes is held by a third party be disclosed as the court determines.

⁵⁹ Commonwealth Secretariat Draft Model Disclosure Legislation. Defence obligations with regard to maintaining control of and properly using information contained in disclosure materials have not as yet been legislated in Canada. However, the Martin Committee recommended that Defence Counsel should maintain proper custody and control over disclosure materials and that Defence Counsel should even withhold information (such as the address of Prosecution witnesses) when its release could threaten the security of another individual. Canadian courts have, though, limited the number of individuals permitted to have access to disclosure materials where they contain sensitive information: See *R. v. Chisholm* (1997), 34 O.R. (3d) 114 (Gen. Div.).

⁶⁰ ODPP Guideline 6 (Practice Direction).

Working with Police and Investigating Officers

42. Although, as described in Chapter 2.1.1, the Prosecution and police are distinct in their roles and operate independently of one another, they must work collaboratively in the disclosure context to ensure that all obligations on the Crown are met. As soon as practicable prior to or upon the accused's first appearance in court, the investigating officer must provide the Prosecutor with copies of all information that may be relevant that the officer is aware of that was obtained (whether by the officer or otherwise) in the course of investigating the matter to which the appearance relates.⁶¹ These obligations continue until the conclusion of the proceedings against the accused.

43. Prosecutors must be alert to the need to provide advice to investigating officers on disclosure procedures generally, the preparation of disclosure materials and specific disclosure issues. They must also thoroughly review information revealed to them and must be alert to the possibility that material may exist that falls within the disclosure criteria. Further, Prosecutors should consider, in every case, whether they can be satisfied that they are in possession of all relevant information.

44. Prosecutors can assist in disclosure management in the following ways:

- providing advice on the general obligations to disclose as set out in case law;
- providing advice and guidance on the structure of the disclosure management strategy to ensure that the materials generated and

⁶¹ See, for example, *Sangster and Dixon v. R.* (Privy Council Appeal No. 8 of 2002). Commonwealth Secretariat Draft Model Disclosure Guidelines. See also UK Attorney General's Guidelines on Disclosure. In Canada, police have a constitutional duty to provide to the Crown all relevant information and material concerning a case obtained in the course of investigation: *R. v. T. (L.A.)* (1993), 84 C.C.C. (3d) 90 at p. 94, 14 O.R. (3d) 378 (C.A.).

collected by the investigators are in a form that meets Prosecution needs and legal requirements;

- providing advice on issues of privilege (such as “police informant” privilege) and editing; and
- providing advice on the scope of disclosure that is required in a particular case.

Obligations of the Defence⁶²

Defence Obligation to Object to Non-disclosure on a Timely Basis

45. If the Crown has disclosed all materials that it believes fall under the disclosure obligation but the Defence knows or ought to know that there are additional materials which could properly fall under the obligation, then the onus is on the Defence to take positive steps on a timely basis (i.e. prior to agreeing upon a trial date) to request disclosure of those materials.⁶³ A Defence request for disclosure may be made at any time after a charge is laid. It is also the responsibility of the case progression officer to ensure that requests for disclosure are promptly made.⁶⁴ If the Prosecution has made broad disclosure but there is an area in which the Defence seeks further disclosure, the Defence should specifically identify the type of material sought. However, neither the Prosecution nor the Defence should make frivolous or unreasonable requests⁶⁵ for the production of documents.

⁶² The principles set out in this Protocol around the Defence’s obligation to pursue disclosure were recognized and applied in *Danhai Williams et al v. R.*, RMCA Nos. 24-26/95.

⁶³ Jamaica implemented a case management process that provides a formal mechanism for Defence to identify additional materials which might require disclosure. In Canada, a similar requirement was set out in *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.) and in *R. v. Dixon*, [1998] 1 SCR 244.

⁶⁴ *Judicature (Case Management in Criminal Cases) Rules*, 2011, s. 5(2).

⁶⁵ For example, where disclosure is requested on a particular type of paper or colour of ink.

46. Prosecutors should be responsive to Defence requests for disclosure. If a Defence request is insufficiently detailed or absent, the Prosecution should inform the Defence of this. If the matter is not resolved, the Prosecution should seek directions from the court.

47. If no request is made, the Prosecution should nonetheless advise the accused prior to trial of any information in the possession of the Prosecution which the Prosecution believes to be exculpatory.⁶⁶

Application by Accused to the Court for Additional Disclosure

48. If an issue of a failure to disclose arises before the commencement of trial, a pre-trial hearing ought to be held. If the issue arises during the trial, the judge may hold a *voir dire* to consider the matter.⁶⁷ Where an accused satisfies the court that the Prosecutor has failed to comply with its full disclosure obligation or secondary disclosure obligation, the court may order the Prosecutor to disclose information to the accused.⁶⁸

Defence Disclosure

49. Where it proposes to adduce expert evidence, the Defence must make disclosure to the Prosecution by providing to the Prosecution a copy of the expert opinion or findings.⁶⁹

⁶⁶ See Kathy Anne Pyke, Assistant Director of Public Prosecutions, "Disclosure: The Duties and Obligations of Prosecuting Counsel in Criminal Proceedings", Presented at Prosecutor's Seminar in Trelawny on 7 December 2003. In Canada, this recommendation was made in the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions*, Queen's Printer for Ontario, 1993.

⁶⁷ Kathy Anne Pyke, Assistant Director of Public Prosecutions, "Disclosure: The Duties and Obligations of Prosecuting Counsel in Criminal Proceedings", Presented at Prosecutor's Seminar in Trelawny on 7 December 2003 at 39.

⁶⁸ *R. v. Barrett* (1970) 12 JLR 179: If the Defence is of the view that the Prosecution has made inadequate disclosure, it is the duty of the Defence "to invite the judge to exercise the discretionary power which is given to him by the proviso in s. 17 of the *Evidence Law*, Cap. 118 [J.] by examining the statement himself and directing that it be used in such manner as the justice of the case demands."

⁶⁹ ODPP Guideline 12 (Practice Direction); *Gibson v. Attorney General*, [2010] CCJ 3 (A.J.).

Early Identification of Evidence and Issues

50. In order to manage the trial process, the court may require a party to identify the written evidence that it intends to introduce and the witnesses that it intends to call, and to indicate whether the party intends to raise any point of law that could affect the conduct of the trial.⁷⁰

Unrepresented Accused

51. As soon as an accused indicates an intention to proceed unrepresented, s/he should be informed by the Prosecutor or by the court of his/her right to disclosure and to apply for additional disclosure, as well as the means of obtaining it.⁷¹ An accused who has not received disclosure is not, though, precluded from entering a guilty plea as long as s/he expresses that s/he does not wish to receive disclosure before the plea is entered.⁷² As in the case of a represented accused, disclosure should be provided to an unrepresented accused in writing. Further, steps should be taken to ensure the existence and appearance of an arms-length relationship with an unrepresented accused.

⁷⁰ *Judicature (Case Management in Criminal Cases) Rules*, 2011, ss. 10(b)(i), (vi) and (viii).

⁷¹ Commonwealth Secretariat Draft Model Disclosure Guidelines. In Canada, providing disclosure to unrepresented accused was discussed in the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions*, Queen's Printer for Ontario, 1993 at 218-220.

⁷² See Canadian Federal Prosecution Service Deskbook at Ch.18.

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